

STATE OF MICHIGAN
COURT OF APPEALS

LORI S. BROCK,

Plaintiff-Appellee,

v

STEVEN L. BROCK,

Defendant-Appellant.

UNPUBLISHED

August 26, 2014

No. 314628

Mecosta Circuit Court

LC No. 11-020495-DM

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM.

In this divorce case, defendant appeals the trial court's division of marital property. Specifically, he challenges its valuation of a business and its determination of his income for purposes of calculating child support. For the reasons stated below, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Both parties are successful entrepreneurs and enjoyed a prosperous lifestyle throughout their marriage. While plaintiff concentrated her efforts on a real-estate business, defendant managed a tire company, Big Rapids Tire. Because of their joint contributions to the family's financial success, the trial court held that marital property be split on an approximate 50/50 basis. However, the trial court had difficulty in determining the precise value of the parties' businesses, investments, and assets because of their failure to provide accurate information on revenue and expenses, and intermingled and badly kept financial records. This poor record-keeping forced the court to "infer, fill gaps, value assets, and distribute property in a reasonable fashion without complete information or accurate information that is needed to reach a result that has a degree of certainty or confidence."

Ultimately, the trial court awarded plaintiff \$1,223,250 in assets with \$745,823 in debt, for a net equity of \$477,427. It awarded defendant \$1,418,400 in assets, which included Big Rapids Tire, and \$722,508 in debts (not including debts he had to pay that were accounted for in valuing Big Rapids Tire), for a net equity of \$695,892. To balance the net equities, defendant was ordered to pay plaintiff \$100,000. The court subsequently adjusted the valuation of plaintiff's assets upward by \$21,925 and adjusted the amount of payments owing from defendant accordingly.

On appeal, defendant makes three claims related to the trial court's assessment of Big Rapids Tire. Specifically, he asserts that the trial court erred when it: (1) used the income approach of valuation on Big Rapids Tire, instead of the asset approach of valuation; (2) miscalculated the amount of debt Big Rapids Tire owed on its building; and (3) miscalculated the debt-repayment component of Big Rapids Tire's valuation. Defendant also argues that the trial court overestimated his income for the purposes of child support.

II. STANDARD OF REVIEW

“[T]his Court will review the method [for valuing a business] applied by the trial court, and its application of that method, to determine if the trial court's valuation was clearly erroneous.” *Kowalesky v Kowalesky*, 148 Mich App 151, 155-156; 384 NW2d 112 (1986). “A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made after reviewing all the evidence.” *Johnson v Johnson*, 276 Mich App 1, 10–11; 739 NW2d 877 (2007). However, “[a] trial court has great latitude in determining the value of stock in closely held corporations, and where a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present.” *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). In other words, if the trial court's findings are upheld, the ruling is reviewed to determine if it was fair and equitable in light of those facts. Again, “the ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable.” *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992).

III. VALUATION OF BIG RAPIDS TIRE

As noted, Big Rapids Tire was primarily managed by defendant, and plaintiff took little part in its operations. Record-keeping at the company was erratic and incomplete, and the trial court found that defendant repeatedly used the business monies to pay for family expenses. Accordingly, defendant's argument that the trial court miscalculated the value of Big Rapids Tire is rather bold, as any deficiencies in the valuation (if there really are any) were exacerbated by defendant's poor record-keeping skills.

Again, defendant's argument on the valuation has three parts, two of which stem from the first. Defendant's overarching claim is that the trial court improperly used the income method of valuation to value Big Rapids Tire, when it was required by Michigan case law to use the asset method of valuation. Defendant says that this error led the trial court to make more errors, specifically in its calculation of the amount of debt Big Rapids Tire owed on real-estate investments and its general debt-repayment obligations. We address each argument in turn.

A. METHODS OF VALUATION

MCR 3.211(B)(3) requires that “[a] judgment of divorce . . . include . . . a determination of the property rights of the parties[.]” “As a prelude to this property division, a trial court must first make specific findings regarding the value of the property being awarded in the judgment. There are numerous ways in which a trial court can make such a valuation, but the most important point is that the trial court is obligated to make such a valuation if the value is in dispute.” *Olson v Olson*, 256 Mich App 619, 627-628; 671 NW2d 64 (2003) (citation and

footnotes omitted). The trial court's role is "that of factfinder, not fact provider." *Perrin v Perrin*, 169 Mich App 18, 23; 425 NW 2d 494 (1988).

Here, the trial court used the income method of valuation to appraise Big Rapids Tire. According to the testimony of plaintiff's expert witness, James J. Gorman, a C.P.A. and Accredited Business Valuator, the income approach of valuation determines the value of a business by converting its anticipated economic benefits into a single numerical amount. Future cash flows expected to be generated by the business are discounted by a rate that reflects the level of risk inherent in those cash flows. Gorman explained that there are different methods of making this calculation. In his valuation of Big Rapids Tire, Gorman chose to compare the business's available cash flow to its equity capital, because the amount of debt Big Rapids Tire had incurred was unclear. Specifically, Gorman divided the "future cash available to equity capital" by the "required rate of return."¹

Defendant takes issue with Gorman's method of valuation, and claims that the court should have applied the asset approach to valuation. This method is seemingly simpler than the income approach. It values assets and liabilities, and then deducts one from the other to calculate the business' net worth. Defendant points to *Kowalesky*, which he says required the trial court to use the asset approach to valuation when it valued Big Rapids Tire. Actually, *Kowalesky* says nothing of the sort, and in fact states: that no "single method should uniformly be applied in valuing a [business]. Rather, this Court will review the method applied by the trial court, and its application of that method, to determine if the trial court's valuation was clearly erroneous." *Kowalesky*, 148 Mich App at 155.

Moreover, Gorman stated that the asset approach is not commonly used when a business is a going concern because: (1) the asset method is not as adept at accounting for intangible values that might be possessed by an existing business; and (2) the records provided by defendant were incomplete and, accordingly, there was "no starting point" for an asset method of valuation. Defendant has not put forth any evidence or authority to suggest that the income approach is an inappropriate method or that it leads to inaccurate results. There is simply

¹ From these calculations, Gorman deduced that an income statement for Big Rapids Tire would show \$3,846 in pre-tax annual income. He added this to what he determined would be \$120,000 annual cash flow plus \$28,206 of annual depreciation and amortization, to arrive at an adjusted income of \$152,052. He then deducted \$43,380 for taxes and determined there would be an outflow of \$13,000 annually to pay off long-term debt and \$5,000 annually for property acquisitions, which gave him an "adjusted cash flow to equity capital" of \$95,672. He then divided this number by an assumed capitalization rate of 19.97 percent, which he explained was "the nature of the market conditioned by actual or subjective opinion of what risks lie with the subject company." Gorman assumed the company was high risk, as reflected in the nearly 20 percent capitalization rate. He indicated that the resulting value would exclude the real estate and the building. This led Gorman to determine that the value of Big Rapids Tire was \$479,000.

nothing to suggest clear error in the trial court's reliance on the income approach as a starting point in the valuation of Big Rapids Tire.²

B. BIG RAPIDS TIRE BUILDING

Gorman affirmed that the valuation of Big Rapids Tire would exclude its physical location. Again, the court awarded defendant Big Rapids Tire at a value of \$479,000 and separately awarded him the Big Rapids Tire building at a value of \$210,000. However, the debt for the building and property, \$97,767, was regarded as a debt of the business and therefore was not deducted from the net assets awarded to defendant, in the calculation of the net equity awarded to him.

Defendant says that both the building's asset value and debt should have been included in the valuation, or both should have been excluded. But this argument has no merit, because Gorman used an income method of valuation, not an asset method of valuation. Because the income approach was a reliable means of valuing Big Rapids Tire, the asset value and the liability for the building were properly accounted for. Accordingly, no adjustment needs to be made for the debt owing on the Big Rapids Tire building.

C. TREATMENT OF BUSINESS DEBT IN VALUATION³

In his valuation of Big Rapids Tire under the income approach, Gorman noted that the business had \$582,000 in debt, \$182,000 of which was long-term, as of December 31, 2011. He assumed that amortization of long-term debt over a reasonable time would result in an outflow of \$13,000 each year. Gorman accordingly reduced the projected cash flow to reflect this debt repayment projection before applying the capitalization rate.

² Defendant also argues that Gorman's assumptions on the value of the parties' net assets were proved inaccurate by the trial court's ultimate division of assets and liabilities, and that because these assumptions were used to value Big Rapids Tire, the valuation is inaccurate. Stated another way, defendant says that a large portion of the business' assets were funded by debt, and that the \$120,000 cash-flow figure Gorman used to value Big Rapids Tire is therefore erroneous.

Again, defendant is in part responsible for the issue of which he complains. Because of his failure to keep proper and detailed business records, the trial court noted that Gorman's valuation of Big Rapids Tire was a "best estimate offered without great confidence." But defendant did not provide the court with countervailing expert evidence on what the proper cash flow or value of Big Rapids Tire should have been. The court was required to announce a value on Big Rapids Tire. It did so to the best of its ability on the evidence provided by the parties, and did not clearly err in so doing.

³ Defendant claims the trial court erred in its determination that \$293,898 of the purchase price debt on Big Rapids Tire was owed to Randy Anderson. Again, his argument is premised on the assumption that the trial court was required to use an asset method of valuation, which, as noted, it was not.

But as defendant notes, Gorman's assumptions on Big Rapids Tire's liabilities were not accurate, as Big Rapids Tire's actual liability was \$121,898 higher:

Liability	Gorman's Assumption	Actual Liability	Actual Including Amount Assigned to Defendant
Purchase contract	\$182,000	\$293,898	
Cadillac Tire	(total of \$400,000 for all	\$100,000	\$293,898
Chemical Bank	three)	\$100,000	\$280,000
Back taxes		\$210,000 ⁴	\$258,000
	\$582,000		\$210,000
Total		\$703,898	\$1,041,898

The trial court based its \$479,000 valuation of Big Rapids Tire on Gorman's inaccurate assumption of \$13,000 per year for long-term debt service. But as the long-term debt increases, so must the value of projected payments for that debt. The trial court must accordingly recalculate the valuation of Big Rapids Tire to account for this potential disparity. In its recalculation, the trial court should not include the amount of Big Rapids Tire debt that was personally assigned to defendant—i.e., the debts that were not included in the \$479,000 valuation—because it is assumed that this portion of the debt will be paid from defendant's personal income, not Big Rapids Tire.

II. DEFENDANT'S INCOME FOR CHILD SUPPORT

A. CHILD SUPPORT GUIDELINES

MCL 552.605 requires that a trial court order child support "in an amount determined by application of the child support formula developed by the state friend of the court bureau [the Michigan Child Support Formula (MCSF) Manual]" unless the court determines that application of the child support formula would be unjust or inappropriate. The MCSF Manual requires that the court begin its assessment through determination of the parents' incomes. 2013 MCSF 2.01. Income⁵ includes "[e]arnings generated from a business, partnership, contract, self-employment, or other similar arrangement, or from rentals," and the MCSF advises that "[i]ncome (or losses)

⁴ The accountant for Big Rapids Tire indicated that taxes had not been completed for tax years 2009, 2010 and 2011 and that this would be the estimated amount owing with interest. The trial court did not make a specific finding in regards to the value of this liability.

⁵ "Income" is also defined by MCL 552.602(m), which references "commissions, earnings, salaries, wages, and other income" from an employer or successor employer, but does not expressly address self-employed persons.

from a corporation should be carefully examined to determine the extent to which they were historically passed on to the parent or used merely as a tax strategy.” 2013 MCSF 2.01(C)(2). In 2013 MCSF 2.01(E), the manual specifically outlines relevant income streams for a court to analyze when the parties are self-employed or business owners.

If the trial court chooses to depart from the Child Support Formula, it must set forth “in writing or on the record all of the following”:

- (a) The child support amount determined by application of the child support formula.
- (b) How the child support order deviates from the child support formula.
- (c) The value of property or other support awarded instead of the payment of child support, if applicable.
- (d) The reasons why application of the child support formula would be unjust or inappropriate in the case. [MCL 552.605(2).]

Here, the trial court did not follow the child support formula when it determined defendant’s income to be \$180,000, nor did it explain how it arrived at this figure. The court indicated that the lack of business records for Big Rapids Tire required it to draw inferences on defendant’s income, and went on to suggest that defendant’s case might be one which required a departure from the child support formula. But the trial court did not determine the child support amount as specified by the child support formula, as required by MCL 552.605(2), nor did it follow the other mandates listed in that statute. Accordingly, we remand for a determination of income based on the child support formula, so that the trial court may find whether departure from the child support formula is warranted per MCL 552.605(2).

B. CREDIT FOR OVERPAYMENTS

MCL 552.603(2) allows for retroactive modification of child support obligations “with respect to a period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payer or recipient of support.” “The only way to ‘undo’ [previously made] payments is by retroactively determining that plaintiff was not, in fact, under an obligation to pay them and retroactively rescinding those court orders. Doing so contravenes the literal dictates of MCL 552.603, as well as its spirit and intended goals.” *Fisher v Fisher*, 276 Mich App 424, 429; 741 NW2d 68 (2007).

Here, defendant unconvincingly claims he is entitled to credits for “overpayment” of child support if the trial court eventually adjusts the amount of support he is required to pay. Although defendant appeals the order that required the support payments, the order was valid at the time defendant made the payments. Further, were our Court to reverse the trial court’s order, the reversal would not speak to the validity of the order at the time the payments were made. Accordingly, defendant is not entitled to credit for overpayments.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Kirsten Frank Kelly